

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	CA No. 16-30080
	)	
v.	)	
	)	
AMMON BUNDY, RYAN PAYNE,	)	
RYAN BUNDY, BRIAN CAVALIER,	)	
and BLAINE COOPER,	)	
	)	
Defendants-Appellants.	)	

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**SUPPLEMENT TO**

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3**

**OR, ALTERNATIVELY, FOR STAY PENDING APPELLATE REVIEW**

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Defendant-Appellant Ryan Payne, through his attorneys, and on behalf of Ammon Bundy, Ryan Bundy (pro se), Brian Cavalier, and Blaine Cooper who through their respective attorneys previously joined in this motion, respectfully submit this supplement to update the Court concerning the necessity for continued emergency consideration of the issues presented in the Interlocutory Appeal and Petition for Writ of Mandamus, previously filed.

**I. The District Court Denied the Appellants' Motion for a Stay.**

As previously noted, the defendants filed a motion for a stay with the Oregon District Court simultaneous with the filing of the appeal and request for emergency consideration with the Court. In its Response to Emergency Motion, the government argued this Court should either deny defendants motion for emergency consideration or a stay, or defer ruling until after the district court had the opportunity to rule on the stay motion in the first instance. *See* Dkt Entry 9-1 at 2. Before the district court, the government opposed the defendants' motion to stay.

On April 6, 2016, the district court held a hearing in which the stay motion was argued by the parties. The district court denied the defendants motion for the stay, stating, "I don't find the stay warranted when I consider all of the factors that I'm required to consider." Attachment A at 24:17-19. However, the district court also recognized the urgent need for this Court to intervene and settle the novel question raised by the defendants' appeal. The District Court stated:

I believe I do need the confirmation by the Ninth Circuit Court of Appeals that this order should stand. And if I'm wrong on these analyses, then it's important that that decision get made by a higher court now for the future progress of this case and the one in Nevada. If – if the Ninth Circuit Court of Appeals believes the defendant should not be transported, they know now of the urgency of the matter. ... So I look forward to the Ninth Circuit providing all of us with controlling direction on this problem.

Attachment A at 26:8-16, 27:4-5. The defendants echo and join in the district court's request that the Court resolve the novel question presented in the appeal.

## **II. Expedited Consideration Continues to be Necessary to Prevent Irreparable Injury to the Defendants.**

Expedited consideration continues to be necessary because the Oregon district court's order (CR 334; ER 1-7) requires the defendants to be transported to Las Vegas, Nevada, on April 13, 2016, pursuant to writs of habeas corpus ad prosequendum issued by a United States magistrate judge in Nevada for the purposes of appearing in the District of Nevada to face separate criminal proceedings in *United States v. Cliven Bundy, et. al.*, Case No. 2:16-CR-00046-GMN-PAL (D. Nev.). For the reasons articulated in the Emergency Motion (Dkt Entry 4), the transport to Nevada for the purpose of arraignment will place the defendants in the impossible position of preparing to defend themselves in two complex cases, in two federal districts, with different lawyers, against charges alleging wholly unrelated events. Thus, the defendants respectfully renew their request that this Court grant expedited consideration and resolution of their Interlocutory Appeal and Petition for Writ of Mandamus.

## **II. Alternatively, This Court Should Stay the District Court's Order.**

If the Court grants emergency consideration but requires additional time to resolve the issue, the defendants respectfully request the Court stay the district court's transport order. This is particularly ripe now that the district court has denied the motion for a stay.

The parties agree the factors articulated in *Nken* are proper for the Court to apply when deciding whether a case order should be stayed. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Applying the factors set forth in *Nken*, the defendants have demonstrated the need for a stay.

### *(1) Likelihood of Success on the Merits*

As the Court previously acknowledged, “[t]here is some uncertainty as to the exact degree of likely success that a petitioner must show, due principally to the fact that courts routinely use different formulations to describe this element of the stay test.” *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (citing *Mohammed v. Reno*, 309 F.3d 95, 100-02 (2d Cir. 2002)). However, “regardless how one expresses the requirement, the idea is that in order to justify a stay, a petitioner must show, at a minimum, that she has a substantial case for relief on the merits.” *Id.* at 968.

For the reasons previously set forth in the Motion for a Stay and the Appellant's Opening Brief, the defendants easily meet the threshold for showing they have a substantial case for relief on the merits. This is an unprecedented dilemma the defendants face. As the district court recognized during the hearing to argue the motion for a stay, "[i]t is and remains a most unusual situation the defendants are facing here." Attachment A at 24:20-21. The unusual situation, coupled with the weighty constitutional rights of the defendants at stake, provide the substantial case for the defendants to succeed on appeal.

(2) *Irreparable Injury*

The district court ruled that defendants' objections are premature regarding foreseeable violations to their respective rights to speedy trial, due process, and to effective assistance of counsel. *See* CR 334 at 4; ER 4. In its response, the government called the defendants claimed prejudice "purely speculative." Dkt Entry 9-1 at 4. The "irreparable harm inquiry" is individualized to each defendant in each case. *See Leiva-Perez*, 640 F.3d at 969 (citing *Nken*, 129 S.Ct. at 176). Under the unusual circumstances of this case, it is both foreseeable and certain that any removal of the defendants from the District of Oregon, over their objection, will cause harm to the constitutional rights they invoke.

The defendants are indeed trying to prevent future infringement of their rights from occurring, so the issue is inherently forward-looking. The standards for reviewing constitutional rights are different pre-trial and post-trial. The law does not require the defendants to wait for the harm to occur before they can merit relief. For example, prior to trial there is no requirement that the defense establish that *Brady* evidence is “material.” *United States v. Price*, 566 F.3d 900, 913 n. 14 (9th Cir. 2009) (“[T]he materiality standard usually associated with *Brady*...should not be applied to pretrial discovery of exculpatory materials...[J]ust because a prosecutor’s failure to disclose evidence does not violate a defendant’s due process rights does not mean that the failure to disclose is proper.”) (citations omitted). Just as the government is obliged to provide evidence favorable to the defendants without a showing of materiality, interference with the attorney-client relationship implicates Sixth Amendment rights without a showing of prejudice. And in this case, the inevitable prejudice from the forcible separation and isolation from counsel should be avoided under the standards for a stay.

The harm is not speculative. As noted in the Appellant’s Opening Brief, there are two other defendants – Joseph O’Shaughnessy and Peter Santilli – who are similarly situated in that they have been indicted in both the districts of Oregon and Nevada in the same cases as defendants. *See* Dkt Entry 5 at 9, fn. 2. Unlike

defendants, however, Mr. O'Shaughnessy and Mr. Santilli, were both released from custody in Oregon, only to be transported in custody to Nevada.<sup>1</sup> The transport and incarceration in Nevada has made it virtually impossible for their lawyers in Oregon to remain in contact with them. For example, Mr. Santilli was transported from Oregon to Nevada on March 29, 2016. Upon arrival in Nevada he was held in segregation for 23 hours a day due to normal intake processing at the Nevada facility.<sup>2</sup> *See* Attachment A at 17:17-18, 18:4-5. Mr. Santilli's communications with his Oregon lawyer are "not good" because his Oregon lawyer cannot make any calls to him. *Id.* at 21:2-6. Mr. Santilli was not permitted to take any discovery materials from his Oregon case during the transport to Nevada. *See id.* at 22:15-19.

Regarding the irreparable injury factor, the government also argued the defendants are resting on an "unreasonable assumption that the district judges in

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<sup>1</sup> Subsequent to his release on conditions in Oregon, Mr. O'Shaughnessy was taken into custody in Arizona, where he resides, based upon the Nevada warrant. He was then transported to Nevada from the District of Arizona pursuant to Fed R. Crim. P. 5(c). During the time he was in custody in Arizona, in transport, and upon arrival to Nevada, Mr. O'Shaughnessy's defense counsel in Oregon was unable to contact him for approximately one month. The inability for counsel to communicate with Mr. O'Shaughnessy was discussed during the hearing before the District Court in Oregon on March 22, 2016, and was again one of the subjects of discussion at the Status Hearing held on April 6, 2016. *See* CR 340 at 43-45; ER 50-52.

<sup>2</sup> Mr. Santilli is being held at the Anderson County Detention Center. Attachment A at 20:25, 21:1.

Oregon and Nevada are incapable of fashioning case management procedures that will adequately protect defendants' interests." Dkt Entry 9-1 at 4. To clarify, the defendants are arguing the government cannot use the Writ process to force the Judiciary to referee between two prosecution offices within the Department of Justice. If simultaneous prosecutions of complex cases were to occur, tremendous time and energy will be spent litigating who goes where, when, and for what purpose.

The government states the district court "narrowly tailored the transportation order to a single ten-day event, she secured a Nevada magistrate judge's 'assurance' that defendants will be returned to Oregon within ten days, and she confirmed with Nevada prosecutors that the Oregon trial will proceed first." *Id.*<sup>3</sup> This argument underscores the defendants' concerns. As stated in the Opening Brief, counsel in Nevada have made it clear that once their respective clients arrive in Nevada, they intend to seek a court order the defendants remain in Nevada. *See* Dkt Entry 5 at 15.<sup>4</sup> Further, although the magistrate judge in Nevada gave a qualified "assurance" that the defendants would be returned to Oregon, the magistrate judge also stated, "I

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<sup>3</sup> The transport and time away from Oregon will be 12 days, not 10. *See* CR 334 at 6, fn. 4; ER 6.

<sup>4</sup> "[t]he reality is that once they're here we're asking they stay because we're going to be asking for speedy trial. We have a case that is a significantly more complicated case than the case in Oregon, that carries much more – much, much greater, significant penalties." CR 340 at 43:9-13; ER 50.



cannot, of course, give you an advisory ruling on motions that have not yet been filed.” CR 340 at 46: 19-20; ER 53. Additionally, the district court in Oregon has made clear that it “does not have any authority to address the arguments about the manner of confinement or access to counsel when defendants are confined in another judicial district.” Attachment A at 25:13-16. It is foreseeable the Nevada district court would rule the same. This leaves the defendants with no forum to resolve attorney-client contact issues in the Oregon case when they are in Nevada defending themselves on the Nevada case, and vice-versa. This is exactly the scenario contemplated by the government.<sup>5</sup> The irreparable injury the defendants will suffer if they are transported to Nevada is plain, foreseeable, and prejudicial.

(3) *Harm to Other Parties / Public Interest.*

The third and fourth *Nken* factors are merged when the government is the opposing party. See *Leiva-Perez*, 640 F.3d at 970 (citing *Nken*, 129 S.Ct. at 1762). The government argues the defendants stay request is inconsistent with their demand for speedy trial in the District of Oregon. See Dkt Entry 9-1 at 5. In fact, the opposite is true. The defendants are trying to prevent their forcible removal from Oregon that will interfere with the defendants’ trial preparation in the Oregon case. The district

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<sup>5</sup> “The district judges in both Oregon and Nevada should be given the opportunity to address defendants’ specific concerns as the needs arise.” Dkt Entry 9-1 at 5.

court's order is for a twelve day removal, which alone effects attorney-client communication and trial preparation, but future transports from Oregon will continue to strain the orderly progression of the case.

The government further argues that “the public interests rest with the trial judge.” Dkt Entry 9-1 at 5. The district court, of course, is not a party to the case. However, the district court made clear its preference for this Court to intervene on this issue:

I believe I do need the confirmation by the Ninth Circuit Court of Appeals that this order should stand. And if I'm wrong on these analyses, then it's important that that decision get made by a higher court now for the future progress of this case and the one in Nevada. If – if the Ninth Circuit Court of Appeals believes the defendant should not be transported, they know now of the urgency of the matter. ... So I look forward to the Ninth Circuit providing all of us with controlling direction on this problem.

Attachment A at 26:8-16, 27:4-5.

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### **III. Conclusion.**

Because irreparable harm will result unless the defendants' receive expedited review of their Interlocutory Appeal and Petition for Writ of Mandamus, and because all four factors in the Court's stay analysis weigh in favor of the defendants, this Court should either grant the defendants' expedited review or stay the district court's order to preserve the status quo until the merits of defendants' interlocutory appeal have been resolved.

Dated this 7th day of April, 2016.

/s/ Rich Federico

Rich Federico

Attorney for Defendant-Appellant

Ryan Payne

**ATTACHMENT A**

**Excerpt Transcript of  
Proceedings  
Held April 6, 2016**

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 UNITED STATES OF AMERICA, )

4 Plaintiff, )

5 v. )

6 AMMON BUNDY (1), )

7 JON RITZHEIMER (2), )

8 JOSEPH O'SHAUGHNESSY (3), )

9 RYAN PAYNE (4), )

10 RYAN BUNDY (5), )

11 BRIAN CAVALIER (6), )

12 SHAWNA COX (7), )

13 PETER SANTILLI (8), )

14 JASON PATRICK (9), )

15 DUANE LEO EHMER (10), )

16 DYLAN ANDERSON (11), )

17 SEAN ANDERSON (12), )

18 DAVID LEE FRY (13), )

19 JEFF WAYNE BANTA (14), )

20 SANDRA LYNN ANDERSON (15), )

21 KENNETH MEDENBACH (16), )

22 BLAINE COOPER (17), )

23 WESLEY KJAR (18), )

24 COREY LEQUIEU (19), )

25 NEIL WAMPLER (20), )

JASON CHARLES BLOMGREN (21), )

DARRYL WILLIAM THORN (22), )

GEOFFREY STANEK (23), )

ERIC LEE FLORES (25), )

JAKE RYAN (26), )

Defendants. )

Portland, Oregon

EXCERPT TRANSCRIPT OF PROCEEDINGS

(Excerpt of Oral Argument)

BEFORE THE HONORABLE ANNA J. BROWN, DISTRICT JUDGE

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1           (The following excerpted proceedings were held on  
2           Wednesday, April 6, 2016; 10:52 a.m.)

3           THE COURT: All right. Thank you very much.

4           All right. Let's move to the motion that is docket  
5           No. 357, for a stay of the order I entered, authorizing the  
6           marshal to honor the habeas corpus writs ad prosequendum for  
7           some certain of the defendants.

8           I wanted first to ask whether -- and I understand,  
9           Mr. Federico, you're basically the lead on behalf of defendants  
10          for this issue.

11          MR. FEDERICO: Yes, your Honor.

12          THE COURT: I'm wondering whether -- you or  
13          Mr. Knight -- you have had any direction from the Ninth Circuit  
14          as to timing or its consideration of the interlocutory appeal.

15          MR. FEDERICO: Your Honor, I'll speak first to that.

16          As part of the circuit rule, you have to alert that a  
17          the motion is coming, emergency consideration. That has been  
18          done. We've been in communication with all of the filings. We  
19          have not yet heard back, though, from the circuit as to whether  
20          or not, one, they're going to grant a request for emergency  
21          consideration; two, any subsequent briefing schedule or when  
22          they would seek to resolve the issue.

23          THE COURT: And you've made clear to the circuit that  
24          under the existing order, the marshal is authorized to start  
25          transporting as of April 13?

1 MR. FEDERICO: Yes, your Honor.

2 THE COURT: All right. Have you heard anything else?

3 MR. KNIGHT: Nothing different, your Honor, no.

4 THE COURT: All right. Mr. Knight, Mr. Federico  
5 argues the district court lost jurisdiction to even consider --

6 No, you're the one arguing that.

7 Let's go back. Sorry.

8 MR. FEDERICO: Yes, your Honor.

9 THE COURT: You're arguing -- the Government was  
10 arguing that the district court did not have jurisdiction to  
11 stay its order because with the interlocutory appeal, it was  
12 the Government's position that substantively that matter has  
13 now been divested.

14 You're relying on the Federal Rule of Appellate  
15 Procedure 8 and its explicit contemplation that the district  
16 court would consider the rule. Right?

17 MR. FEDERICO: Yes, your Honor. That is certainly  
18 the starting point.

19 Also, I note I had a reply that was drafted that --  
20 and then I saw the Court's e-mail the replies will not  
21 typically be permitted. I only state that because I am  
22 obviously prepared to orally state some case law and talk about  
23 the Government's --

24 THE COURT: Let's start about jurisdiction first. Go  
25 with that point. Then I would like to hear from Mr. Knight on

1 the jurisdiction issues. And then we will go to the merits, if  
2 I'm persuaded I have the authority to consider this motion.

3 MR. FEDERICO: Yes, your Honor.

4 Regarding jurisdiction, the Court is correct.  
5 Primarily, relying first on Federal Rule of Appellate Procedure  
6 8(a), saying the district court in fact has priority over  
7 jurisdiction. And I believe the Government's response somewhat  
8 mischaracterized what the defense had filed; both in the Ninth  
9 Circuit.

10 They said that we -- once we filed the notice of  
11 appeal, the district court had been divested of jurisdiction  
12 because we also sought a stay directly with the Ninth.

13 What we did with the Ninth was filed for a request  
14 for emergency consideration and then stated, also, that we were  
15 simultaneously filing for a motion to stay with the district  
16 court. Those were filed on the same day.

17 And then said to the Ninth Circuit that if the  
18 circuit court determines that it requires additional time to  
19 resolve the matter and the stay hasn't been issued, then we  
20 would request the Ninth Circuit to stay the district court  
21 order.

22 In other words, the conditions are that if the  
23 district court has not stayed it, the Ninth Circuit has said  
24 they need more time to resolve, then we would ask the Ninth  
25 Circuit to consider a stay.

1 Which is different than what -- the Government's  
2 response in saying that we had just gone to the Ninth and  
3 sought a stay directly.

4 So we believe under the -- the rule of appellate  
5 procedure, the district court has, in fact, then priority  
6 jurisdiction.

7 And I think also, your Honor, the cases cited by the  
8 Government don't stand for the proposition that really what  
9 we're asking the Court here is a procedural matter and not a  
10 substantive matter. Because the case law they provided -- for  
11 example, the **Griggs versus Provident Consumer** case from 1982.  
12 And they said that the Court is now divested of jurisdiction  
13 over, quote, the matter as being appealed. Well, the matter  
14 being appealed is the transport order. We haven't asked the  
15 Court for reconsideration of that order.

16 And -- and, likewise, other case law -- for example,  
17 there's a case **In Re Thorp**, from the Ninth Circuit, from  
18 1981 -- the citation for that, your Honor, is 655 Federal 2d  
19 997. It says that the matter on appeal is a different  
20 question, and the Court can consider those matters that are,  
21 quote, in aid of the appeal, such as procedural matters. And  
22 that's the way we view the current motion to the Court.

23 The other cases cited by the Government,  
24 **Ortega-Lopez**, held that the Court lacked jurisdiction -- excuse  
25 me, the district court lacks jurisdiction to correct a

1 sentence. Again, that's a substantive matter.

2 Likewise, the **Vromen** case, in that case it was the --  
3 the Court held the district court lacked jurisdiction to  
4 consider a reconsideration of probation revocation. Again, a  
5 substantive matter. So we distinguish the jurisdictional  
6 questions on that ground.

7 We believe the district court retains priority  
8 jurisdiction to resolve the procedural question for now. And,  
9 again, the substantive question as to whether or not the  
10 transport should go forward is certainly a matter that we  
11 concur with the Government is properly now left to the  
12 appellate court.

13 THE COURT: Thank you, Mr. Federico.

14 Mr. Knight, on jurisdiction.

15 MR. KNIGHT: Thank you, your Honor.

16 With respect to jurisdiction, I think as a threshold  
17 matter, the parties agree what the rule is and what the cases  
18 are. The difference is an interpretation of the facts.

19 And in this instance, to say that there's a  
20 procedural and substantive difference is a distinction without  
21 a difference. The procedure is the substance of the appeal.  
22 The very idea that the basis of the appeal and the arguments  
23 underlying the appeal relate to the transport itself and to the  
24 stay and the attendant concerns about the deprivation of rights  
25 with the movement of the defendants is the same as the

1 procedure. So there's no difference. So, to split hairs and  
2 to claim that really there is a procedural issue before the  
3 Court and a separate substantive issue now contained in the  
4 appeal, we believe, is inaccurate.

5 And the cases that have been cited, we agree with.  
6 And we would argue that their holdings do in fact bind this  
7 Court and properly lay a factual and legal foundation for the  
8 conclusions set forth in the brief; and that is, by virtue of  
9 the arguments the defendants have made about the transport of  
10 these defendants, this Court has been divested of jurisdiction  
11 on this narrow issue.

12 THE COURT: All right. Well, let's move to the  
13 merits argument, so that I have a full record here before I  
14 have to decide this issue.

15 The Government filed its opposition on the merits.  
16 Your primary grounds are ones that were actually argued in the  
17 first instance, Mr. Federico, in opposition to the order.

18 So if there's something else you wanted to add or  
19 emphasize, I'll hear from you and then from Mr. Knight.

20 MR. FEDERICO: Thank you, your Honor.

21 Yes. The starting point, I think the parties both  
22 agree that the **Nken** factors from the Supreme Court would apply  
23 to the motion to stay. I won't rehash the arguments, but will  
24 sort of give an oral reply to the Government's response.

25 The first factor is the likelihood of success on the

1 merits. In fact, I don't think either party correctly -- or I  
2 shouldn't say "correctly," but fully cited some case law that I  
3 think gives a little more detail as to what that means.

4 For example, a case called **Leiva-Perez v. Holder**.  
5 The citation for that is 640 Federal 3d 962. That is a Ninth  
6 Circuit case from 2011. That case, the Ninth Circuit openly  
7 acknowledged that there is uncertainty as to the exact degree  
8 of what the likelihood of success has to be. And it stated  
9 that the test was a substantial case for relief on the merits.

10 So what is a substantial case? I believe that in  
11 this case we've easily met that threshold. I mean, as this  
12 Court acknowledged, when the issue was brought to the Court's  
13 attention, this is a very unusual circumstance with these two  
14 complex trials simultaneously and these are some very weighty  
15 cons -- constitutional rights at issue.

16 And so I'll just stand on the briefs that have  
17 already been filed, as to whether or not there is a substantial  
18 case for relief. But I just wanted to invite the Court's  
19 attention to what the Ninth Circuit has said that standard  
20 means.

21 As to the second factor of the irreparable injury,  
22 again, the Court's order originally was that those -- any  
23 injury or harm was premature. The Government's response, they  
24 called it, quote, purely speculative.

25 I would say that the same Ninth Circuit case I just



1 cited also detailed that this particular factor of irreparable  
2 injury is very individualized. It's very case specific. And I  
3 think that is important here because of the unusual nature of  
4 these circumstances. And -- and I would concur that we're  
5 seeking to prevent a future infringement of rights. So,  
6 inherently, the process is forward-looking.

7 But here, I think there is some also some case law  
8 that's informative, that states that when you bring the matter  
9 of constitutional rights infringements to the Court's  
10 attention, also it's telling as to what the review is.

11 For example, if you raise constitutional issues  
12 pretrial versus post-trial -- and the analogy I'll give here is  
13 **Brady**. The Ninth Circuit, in the **Price** case, at 566 Federal 3d  
14 900 -- and that's a 2009 case -- said that on -- on appellate  
15 review, if you claim there's been a **Brady** violation, you have  
16 to make a showing of materiality. But when you're claiming  
17 that same violation before it has been -- the trial has been  
18 adjudicated, you don't have to show materiality. I think  
19 that's again -- illustrates that when you bring the matter, in  
20 terms of constitutional rights and infringement, that -- a  
21 decision is made as to what -- the proper showing. Because we  
22 have argued and would argue that the defendants need not show  
23 prejudice at this point because it's a structural issue.

24 And I'm also going to defer to Mr. Arnold. I think  
25 he has a comment regarding prejudice, as well.

1           In the Government's response, they stated that we  
2 were not resting -- or, excuse me, that the terms of the  
3 irreparable injury factor, that we're resting on an  
4 unreasonable assumption that this Court -- the district courts  
5 are incapable of fashioning, sort of, case management  
6 procedures to protect the rights. And I think that, again,  
7 sort of mischaracterizes what the harm is we're articulating.

8           In the opening brief that we have provided as an  
9 attachment to the Court, we stated there is a body of case law,  
10 the Sixth Amendment -- particularly, rights to effective  
11 assistance of counsel -- that talks about basically breaks in  
12 contact between defendants and lawyers; and sometimes, in as  
13 short as 17 hours, is found to be a violation of the Sixth  
14 Amendment.

15           And so, really, as we said in the motion, we see  
16 this -- or, excuse me, the opening brief in the Ninth Circuit,  
17 is that the Government in the two districts within the  
18 executive branch from the Department of Justice has asked the  
19 Court to sort of referee and facilitate this process, which the  
20 courts are capable of doing. But, on the other hand, the  
21 defendants are the ones who suffer the harm from that.

22           And there's a concern here, in terms of harm, that  
23 what is likely to happen is if they're transported to Nevada,  
24 there's going to be substantial litigation time spent on who is  
25 where and when, and what they're going to be doing there.

1 Because, as we've been discussing all morning, this is very  
2 difficult and challenging to come up with a case management  
3 order here, with the number of defendants. And I would just  
4 imagine -- it's not even speculative -- that Nevada is going to  
5 face the same problem.

6 Lastly, your Honor, regarding the third and fourth  
7 **Nken** factors, which as the parties briefed, merge together  
8 between the Government and the opposing party. And those  
9 factors are the harm to the other party and the public  
10 interest.

11 The Government stated in its response that its motion  
12 for stay is inconsistent, and the defendants are being  
13 inconsistent with their demand for speedy trial. And we would  
14 state the opposite is true because what we are trying to do is  
15 keep them here in Oregon, to keep their case on track.

16 And so that there is in fact -- trying to prevent any  
17 events, such as a transport, that would interfere with their  
18 case preparation in this case, here in the District of Oregon.

19 So not only do we see no inconsistency with the  
20 demand for speedy trial, we believe a stay of the order in  
21 seeking the appeal of the transfer order is in fact consistent  
22 with the demand for speedy trial.

23 And so, your Honor, if I may also -- I just mentioned  
24 a moment ago, I defer to Mr. Arnold. I think that he had  
25 some -- a point he wanted to make regarding potential

1 prejudice.

2 THE COURT: Certainly.

3 Mr. Arnold.

4 MR. ARNOLD: Thank you, your Honor.

5 Regarding the issue of prejudice, my client has not  
6 been transported yet, so he doesn't have any actual prejudice.  
7 But I do have proof that it's more likely than not that if he  
8 is transferred, there is likely to be prejudice.

9 I have an affidavit that we received after hours last  
10 night, and it is essentially from a woman named Deborah  
11 Reynolds. And she has been in contact with Peter Santilli --  
12 who was transported previously -- on the phone.

13 And I have the affidavit. But I was just going to  
14 read portions -- or read it by way of proffer, or I could give  
15 it to the Court.

16 THE COURT: Who is Deborah Reynolds?

17 MR. ARNOLD: Deborah Reynolds is the significant  
18 other and co-host of *The Pete Santilli Show*.

19 THE COURT: All right.

20 MR. ARNOLD: She's in regular telephone contact with  
21 Pete Santilli, and my understanding -- from speaking to her on  
22 the phone -- regular contact with Pete's attorney, Tom Coan.

23 And she had received specific information from  
24 Mr. Santilli, over the phone, that she conveyed to me. And  
25 then we had it reduced to a declaration, regarding his

1 deprivation of access to counsel while he is in Nevada.

2 And with the Court --

3 THE COURT: Since the last hearing, he's been  
4 transported to Nevada. Is that what --

5 MR. COAN: He was transported on Tuesday, your Honor.

6 THE COURT: Thank you. That point wasn't clear for  
7 the record.

8 Go ahead.

9 MR. ARNOLD: Sorry, your Honor.

10 THE COURT: All right.

11 MR. ARNOLD: Thank you. Ms. Reynolds states that she  
12 spoke to Mr. Santilli approximately three days prior to signing  
13 this, which would have been the -- the -- the 2nd.

14 And he told me -- he told me that he could not  
15 believe what's happened since he had been in Nevada. The first  
16 couple of days he thought he would just deal with the  
17 conditions of incarceration, but found himself in a cell 23  
18 hours a day.

19 And, your Honor, I'll just point out, by way of  
20 proffer, this is a similar experience that they -- many of  
21 defendants -- if not all of them -- saw here in Oregon. That  
22 there is a -- a jail policy at Multnomah County jail to do this  
23 secluded treatment for 23 hours a day, basically, in order to  
24 essentially process them.

25 I talked to Captain Peterson, at the jail. And it

1 wasn't anything specific to these defendants. It's just what  
2 they claim they always do in order to do their intake process  
3 for two weeks.

4           So, in essence, they're getting a solitary  
5 confinement twice over. They're being re-intaked. Apparently  
6 at least Mr. Santilli is, down there. And the problem with  
7 that is he is essentially in lockdown. And that this is --  
8 again, back to the proffer. That means he is only allowed to  
9 come out of his cell when there are no other inmates present.  
10 This means that he's only allowed to come out of his cell late  
11 at night, 11:00 p.m. local time. That means that he can only  
12 contact his attorneys during that time. It's my understanding  
13 he eventually -- after the phone call I had with Ms. Reynolds,  
14 he was able to reach out and speak to Mr. Coan during business  
15 hours, and I don't have any other details about that.

16           At the time, it prevented him from contacting his  
17 attorney in Oregon and also prevented him from having family  
18 time, and everything else.

19           And we know, by way of proffer from Mr. Bundy's  
20 experience in Oregon, during that one-hour time, he has to  
21 shave, he has to clean his cell, he has to do personal  
22 business, he has to call his family. And then, you know, he  
23 can shower and then find time to, you know, do -- do all of  
24 these personal things that -- you know, cleanliness, that's  
25 sort of a, you know, natural right to do. And, also, if you

1 transfer that obligation -- the personal obligations to the  
2 Nevada situation, you also have to call your lawyer.

3 THE COURT: So you're saying this exists for the  
4 first 24 hours?

5 MR. ARNOLD: No. It was two weeks here in Oregon.  
6 And apparently it was -- if it was last Tuesday through  
7 Friday -- or Tuesday through Saturday. So Tuesday, Wednesday,  
8 Thursday, Friday -- five days in Nevada.

9 DEFENDANT AMMON BUNDY: My dad and brother are  
10 still --

11 MR. ARNOLD: Yeah. Hold on.

12 By way of proffer, my understanding, from speaking to  
13 Carol Bundy and from speaking to her -- or Mr. Cliven Bundy's  
14 attorney, he's been in some sort of similar conditions for over  
15 a month.

16 THE COURT: All right.

17 MR. ARNOLD: Apparently, since -- just by way of  
18 candor, also since he began raising these issues with the jail  
19 guards, he's been allowed out of his cell for two hours a day;  
20 apparently starting on Saturday, is my understanding. He was  
21 able to apparently talk to his Oregon attorney during that day,  
22 which I believe would have been -- what day is today? Would  
23 have talked to his attorney on Monday.

24 The guards -- this is hearsay within hearsay. But  
25 the guards personally told Pete, who told Mr. Reynolds -- or

1 Mrs. Reynolds, that it was a hardship on jail staff to take the  
2 efforts necessary to keep him from other inmates while in  
3 custody.

4 So it appears that there's a suggestion that they're  
5 doing it, you know, for the purported safety of the individual  
6 defendants.

7 And what I would ask -- in addition to the stay --  
8 and the Court asked what could be done in relation to  
9 Mr. O'Shaughnessy. I think all of the defendants would benefit  
10 from a proactive approach to -- to protecting their rights that  
11 are -- could potentially be inhibited based upon this  
12 information.

13 We would ask that the Court require the Government to  
14 show cause through an evidentiary hearing, where the Court can  
15 actually evaluate the condition of the facilities by way of --  
16 you know, we can Skype it or telephone call, or whatever. Have  
17 the warden of these jails, have the -- have the main jailer  
18 that's helping with Mr. Santilli, we can flesh out factually  
19 what is actually occurring and the Court can inquire, as  
20 opposed to the -- you know, the executive branch, through the  
21 U.S. Attorney's inquiring.

22 THE COURT: Thank you.

23 Mr. Coan, did you want to add anything to that?

24 MR. COAN: What I can add to that, your Honor, is I  
25 will say, Mr. Santilli's being held at the Anderson County



1 Detention Center, just outside of Las Vegas.

2 I cannot make any calls in to him. He can only make  
3 calls to me. So my communications with him are, you know, not  
4 good, because I don't know when --

5 THE COURT: Has he been -- I'm sorry.

6 MR. COAN: I don't know when he's going to call.

7 THE COURT: Has he been appointed counsel there?

8 MR. COAN: He was appointed counsel. That -- that  
9 attorney, as of yesterday, had not visited him.

10 THE COURT: All right. As yet.

11 MR. COAN: As of yet.

12 THE COURT: All right. And just to refresh my memory  
13 of the order that is the subject of this interlocutory appeal,  
14 it also anticipated that if that order was exercised according  
15 to its terms, Mr. Santilli would be returned to Oregon once  
16 those who were transported were returned.

17 MR. COAN: There was an alternative plan, your Honor.  
18 We had hoped to have a detention hearing or a review of  
19 detention down in Las Vegas before the 13th. Because it's my  
20 understanding that if the Court doesn't stay this order, these  
21 defendants, here, will be transported down on the 13th. The  
22 marshals may be able to transport Mr. Santilli back up here at  
23 that time. If he hasn't had his review of detention hearing at  
24 that time, it will be the 23rd.

25 THE COURT: All right. So I understand the point

1 about prejudice, having to do with the manner of confinement in  
2 Nevada; the concerns the defendants have who are the subject of  
3 this order.

4 So were there any other points before I hear from the  
5 Government?

6 MR. ARNOLD: My client reminded me that -- another  
7 issue that was brought to our attention was the lack of --  
8 traveling with the legal documents.

9 THE COURT: I addressed that at the last hearing.

10 MR. ARNOLD: Right. And I believe Mr. Coan --

11 MR. COAN: I can also add to that, your Honor. I  
12 was -- the marshals here tried to accommodate. Mr. Gabriel  
13 told me that he -- Mr. Santilli would be able to take with him  
14 up to a large envelope of documents with him.

15 I gave him an envelope to secure some discovery  
16 documents, that he could look at in his travels. When he  
17 actually made the travel, he was told he couldn't take  
18 anything. So those have all been returned to me, and he  
19 doesn't have any discovery materials down there.

20 THE COURT: They are back in your possession?

21 MR. COAN: Yes.

22 THE COURT: Thank you. All right.

23 Mr. Knight.

24 MR. KNIGHT: Thank you, your Honor.

25 With respect to the merits, I'll focus only on the

1 second factor laid out in the parties' briefing, and the  
2 Government will rely on its briefs for the other factors. And  
3 that factor is whether or not there is indeed irreparable  
4 injury absent a stay. And, again, I get back to the language  
5 "irreparable injury."

6 What has been proffered to the Court today and what  
7 already exists in the record does not amount to what would  
8 constitute an irreparable injury. It is, by and large,  
9 speculative.

10 And I want to speak specifically, right now, of  
11 course, to the concerns about confinement in Nevada because the  
12 harm has to be attendant, of course, to the Court's order  
13 itself. Not just general confinement conditions here in the  
14 District of Oregon, but really as they relate to Nevada.

15 Nothing that has been proffered would suggest there  
16 is an irreparable injury or such a severe injury to the  
17 defendant's Sixth Amendment rights such that his rights -- in  
18 this case, Mr. Santilli's rights -- have been impaired.

19 It was conceded that Mr. Santilli had some contact  
20 with Mr. Coan. And I can't speak to the efficacy of the  
21 procedures in the jail there. But the bottom line is the  
22 record, as it stands right now before this Court, suggests that  
23 Mr. Santilli is still receiving representation as a result of  
24 the order that's already been effectuated. And there is  
25 nothing to suggest -- going forward with these other

1 defendants -- that the District Court in Nevada or the Marshals  
2 Service can't ensure that they will have access to counsel or  
3 legal materials, going forward. And that seems to be the  
4 issue -- the narrow issue as presented by these new arguments  
5 today.

6 And with that, your Honor, the Government will rest  
7 on the existing arguments in the brief, and supplement it only  
8 with the fact, again, that the arguments about harm appear to  
9 be purely speculative. And even if accepted at face value,  
10 don't rise to the level of irreparable injury.

11 THE COURT: All right. Give me a moment, please.

12 (Pause, referring.)

13 THE COURT: I have taken seriously the arguments  
14 defendants raise on all grounds.

15 I conclude that the question the Government has  
16 raised as to the Court's jurisdiction to consider the  
17 defendants' motion to stay is, in any event, moot, because I  
18 don't find the stay as warranted when I consider all of the  
19 factors that I'm required to consider.

20 It is and remains a most unusual situation the  
21 defendants are facing here. The Court's authority over this  
22 prosecution does not extend to controlling the manner in which  
23 a co-equal court in Nevada chooses to control a proceeding  
24 involving some of the same parties.

25 I tried intentionally to make the order I did enter

1 narrow, time specific, and limited to the one anticipated  
2 transport that I've authorized. And I believe, in doing so, I  
3 have rendered inarguable, really, the argument of irreparable  
4 injury. The whole format and extent of the order is that  
5 defendants will be away for a period of about ten days. And I  
6 don't find under any of defendants' arguments that that in any  
7 way is an injury to their constitutional rights: The right to  
8 access to counsel here; their right to speedy trial here; their  
9 right to due process here.

10           The extent to which they wish to challenge -- if my  
11 order stands -- in Nevada the impact of that order on them  
12 there, that's a matter for the Nevada court to address.

13           It's clear that this Court does not have any  
14 authority to address the arguments about the manner of  
15 confinement or access to counsel when defendants are confined  
16 in another judicial district.

17           It's clear the defendants who are the subject of this  
18 order do not want to go to Nevada, and I have -- and I  
19 certainly appreciate their need to be here and to move forward  
20 on the schedule that I'm trying very hard to implement so that  
21 we do commence a trial at what I believe is the earliest  
22 feasible time, beginning with jury selection on September 7.

23           I don't believe there's any showing, then, of a  
24 likelihood of success on the merits here because the fact that  
25 it's an unusual case doesn't -- doesn't equal a substantial

1 case for relief on the merits; the narrow tailoring of the  
2 order itself minimizes any risk of a constitutional violation;  
3 and ten days is just that, ten days.

4 I don't believe any injury the defendants anticipate  
5 is irreparable. I don't believe that there is any significant  
6 Government or public interest in not allowing the District of  
7 Nevada to have the defendants for this limited period of time.  
8 And more pract -- pragmatically, I believe I do need the  
9 confirmation by the Ninth Circuit Court of Appeals that this  
10 order should stand.

11 And if I'm wrong on these analyses, then it's  
12 important that that decision get made by a higher court now for  
13 the future progress of this case and the one in Nevada. If --  
14 if the Ninth Circuit Court of Appeals believes the defendant  
15 should not be transported, they know now of the urgency of the  
16 matter.

17 I know Mr. Federico and counsel for the affected  
18 parties will be contacting the court, the Ninth Circuit Court  
19 of Appeals, promptly after this session today, to let them know  
20 that I did not stay the order. And that they will need to  
21 address it or the marshal will in fact transport. The order  
22 remains in effect until an authority overrules it or says it is  
23 no longer in effect. And I do not intend to do that here.

24 So, therefore, I don't need to resolve what I think  
25 is an interesting theoretical question about jurisdiction.

1 Because if I did have jurisdiction, I would deny the motion to  
2 stay on the matters for the reasons indicated; and if I don't  
3 have jurisdiction, then the question is moot.

4 So I look forward to the Ninth Circuit providing all  
5 of us with controlling direction on this problem. I do not  
6 anticipate the issue would arise again here in Oregon, as I've  
7 already indicated, and so I'm denying the motion to stay.

8 Mr. Bundy.

9 DEFENDANT RYAN BUNDY: Yes, your Honor. I  
10 respectively take exception to your ruling. I do feel that  
11 there would be irreparable -- irreparable damage. As far as I  
12 know, to date, there is no method and science to move back in  
13 time the time that we would lose in transport, in -- in booking  
14 in and out, et cetera, et cetera; as time that would be lost on  
15 both cases, for both trials, that would not be irreparable.

16 And, you know, you -- you, as a judge, do have the  
17 power and the authority to -- to stay that motion, to move us.

18 THE COURT: Well, Mr. Bundy, I didn't say I didn't  
19 have the power.

20 DEFENDANT RYAN BUNDY: I understand.

21 THE COURT: I said, on the merits, I don't believe  
22 it's warranted here.

23 DEFENDANT RYAN BUNDY: I understand.

24 MS. LUDWIG: Is that it?

25 DEFENDANT RYAN BUNDY: Say that again?

(Pause, Ms. Ludwig and Defendant Ryan Bundy  
conferring. Ms. Ludwig and Defendant Bundy sit.)

THE COURT: You're -- all of the defendants affected  
by my original order have an exception to the ruling just made.

As I expect, Mr. Federico will be in touch with the  
Court of Appeals promptly to see if they will provide expedited  
guidance on whether a ruling on any issue is forthcoming before  
the close of business on April 12.

(Conclusion of excerpt.)

--oOo--

I certify, by signing below, that the foregoing is a correct  
stenographic transcript of the oral proceedings had in the  
above-entitled matter this 7th day of April, 2016. A  
transcript without an original signature or conformed signature  
is not certified. I further certify that the transcript fees  
and format comply with those prescribed by the Court and the  
Judicial Conference of the United States.

/S/ Amanda M. LeGore

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AMANDA M. LeGORE, CSR, RDR, CRR, FCRR, CE  
CSR No. 15-0433 EXP: 3-31-2018



9th Circuit Case Number(s) 16-30080

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C. Michael Arnold, Arnold Law, 401 E 10th Ave., Ste. 400, Eugene, OR 97401 (A. Bundy)  
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Signature (use "s/" format)

s/ Rich Federico